Public Prosecutor v Norsapiana bt Yusof

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HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NO 41–28 OF 2011
SUPANG LIAN J
11 JUNE 2012

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Criminal Procedure — Appeal — Appeal against discharge and acquittal — Accused charged for having in possession 28.88g of methamphetamine — Offence under s 12(2) of the Dangerous Drugs Act 1952 — Whether magistrate erred in law and fact — Whether crucial facts put by defence witness rebutted by prosecution by way of cross-examination — Whether evidence on existence of one Arlinda at place of incident and yellow bag challenged by prosecution during cross-examination — Whether result of fingerprint tendered — Whether evaluation of all evidence made available at trial

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Upon receiving information from an informer, a police party conducted a drugs raid at a restaurant. A Proton Exora driven by a relative of the accused, entered Bandar Maju. The passengers in the car were the accused and her friend, Salasiah Basri. The vehicle was blocked and realising the presence of the police, the accused threw the yellow paper bag she was holding on to the ground. The accused was arrested and inspection on the contents of the yellow paper bag revealed a black plastic bag containing two transparent packets of a white substance which suspected to be Methamphetamine. It amounted to 53g. It was the accused's story that on the day of the incident, the accused had met one Dayangku Arlinda ('Arlinda') to get 'ubat gensing' from her. When they met, Arlinda then asked her to get it from her car that was parked elsewhere. She then got into her Proton Exora car and proceeded to Arlinda's car. As she was approaching Arlinda's car, a white car suddenly stopped her. The accused claimed that Arlinda had then thrown a bag to her, reversed her car and then fled the scene. She claimed to have informed the arresting officer about the car, which left the car park, but was ignored. The accused alleged that she did not know about the content of the bag. She also said that she did not know the weight of the items seized. The accused went on to say that no caution was given to her immediately after her arrest and her statement was taken two days after her arrest. The accused/respondent was charged for having in possession, 28.88g of methamphetamine, an offence under s 12(2) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39A(1)(r) of the same Act but was discharged and acquitted. The prosecution appealed against the discharge and acquittal and contended that the learned magistrate had erred in law and fact by concluding that the crucial facts put by the defence witness was not rebutted by the prosecution by way of cross-examination and by concluding that the evidence of the accused on the existence of Arlinda who was allegedly

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A at the place of incident and the yellow bag thrown at her by the said Dayangku Arlinda was not challenged by the prosecution during cross-examination; by ruling that the prosecution did not tender the result of the fingerprint though the test was done; by not explaining why the result of the fingerprint test was negative; and for failing to evaluate all the evidence made available at the trial.

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Held, allowing the appeal:

(1) The defence had not raised a reasonable doubt in the case for the prosecution and the learned trial magistrate had erred in so finding. Based on the evidence adduced, the prosecution had proved its case C beyond reasonable doubt (see para 30).

(2) The learned magistrate was of the view that there was no challenge of the evidence of the accused of the presence of Arlinda and according to the learned magistrate, this has created a reasonable doubt in the case for the D prosecution. The court disagreed that there was no challenge of the evidence of the accused on these material issues. The prosecution had in fact challenged, in the strongest of terms, the evidence of the accused on the presence and role of Arlinda. Therefore, the learned magistrate had misdirected himself when making the finding of fact that there was no E challenge of the accused's evidence on these material facts (see paras 15–16).

(3) In the present case, as there was direct evidence of the accused's possession of the yellow paper bag and her identity was sure, the finger print or DNA evidence assumed very little value or significance. The lack of it did not F detract from the issue of possession in this case. Thus, when the learned magistrate held that the failure to tender the result of the fingerprinting test had raised a reasonable doubt in the case for the prosecution, he had, misdirected himself and had erred in fact and in law (see paras 24–25).

G (4) The case for the prosecution was one of possession of dangerous drugs. Numerous prosecution witnesses have testified that the incriminating evidence was carried by the accused. Their testimonies were direct evidence of the primary element of the charge, namely, possession of drugs. The fact that the accused carried the incriminating evidence H connoted the element of possession whereas the fact that she threw the incriminating evidence upon realising the presence of the police infers knowledge. Alternatively, the presumption of knowledge under s 37(d) of the DDA applied. Thus, the elements of drugs possession under s 12(2)/39A(1)(r) of the DDA have been established by the prosecution I to the required standard of proof. The accused, in entering her defence had failed to cast any reasonable doubt on the case for the prosecution. Her story of the presence at the scene and the role of Arlinda was a fabrication. Hence, the learned magistrate erred in not finding the accused guilty of the offence charged (see para 26).

(5) On the totality of the evidence, the story of the accused about the presence of 'Arlinda' and her role as agent provocateur was unsupported by any evidence whatsoever. Learned counsel for the accused had disclosed the purported mobile phone number of Arlinda during trial. Moreover, it was the case for the accused that Arlinda was a dealer in 'Ginseng' tablets and that she used to buy the tablets from her and resold them at a slightly higher price. That being the case, there was no reason for the defence not to have called Arlinda to give evidence in support of the case for the defence. If she were called to give evidence, the prosecution's case would have been reduced to shambles for lacking credibility. It was safe to conclude that the story of the accused on the presence and role of Arlinda was a fabrication. It appeared to be an attempt to create the semblance of reasonable doubt in the case for the prosecution (see para 29).

[Bahasa Malaysia summary

Setelah menerima maklumat daripada pemberi maklumat, pasukan polis telah menjalankan serbuan dadah di sebuah restoran. Kereta Proton Exora yang dipandu oleh saudara tertuduh, telah memasuki Bandar Maju. Penumpang dalam kereta itu adalah tertuduh dan kawannya, Salasiah Basri. Kenderaan itu telah dihalang dan menyedari kehadiran polis, tertuduh telah membuang beg kertas berwarna kuning yang dipegangnya ke tanah. Tertuduh telah ditangkap dan pemeriksaan ke atas kandungan beg kertas berwarna kuning itu memperlihatkan beg plastik hitam yang mengandungi dua bungkusan lutsinar yang terdapat bahan putih disyaki methamphetamine seberat 53g. Tertuduh menyatakan bahawa pada hari kejadian, tertuduh telah berjumpa dengan Dayangku Arlinda ('Arlinda') untuk mendapatkan 'ubat gensing' daripadanya. Apabila mereka berjumpa, Arlinda kemudian telah meminta untuk mendapatkan daripada keretanya yang terletak di tempat lain. Dia kemudian telah masuk dalam kereta Proton Exora itu dan menuju ke kereta Arlinda. Apabila dia menghampiri kereta Arlinda, sebuah kereta putih tiba-tiba menghentikannya. Tertuduh mendakwa bahawa Arlinda kemudian telah membuang sebuah beg kepadanya, mengundur keretanya dan kemudian beredar dari tempat kejadian. Dia mendakwa telah memberitahu pegawai penangkapan tentang kereta itu, yang ditinggalkan di parkir kereta, tetapi tidak dihiraukan. Tertuduh mengatakan bahawa dia tidak mengetahui tentang kandungan beg itu. Dia juga mengatakan bahawa dia tidak mengetahui berat barang-barang yang dirampas. Tertuduh kemudian mengatakan bahawa tiada amaran diberikan kepadanya sejurus selepas tangkapannya dan kenyataannya telah diambil dua hari selepas tangkapannya. Tertuduh telah dituduh, memiliki 28.88g methamphetamine, satu kesalahan di bawah s 12(2) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 39A(1)(r) Akta sama tetapi dibebaskan dan dilepaskan. Pendakwaan telah merayu terhadap pembebasan dan pelepasan dan menegaskan bahawa majistret bijaksana terkhilaf dari segi undang-undang dan fakta dengan memutuskan bahawa

fakta penting yang dikemukakan oleh saksi pembelaan tidak dipatahkan oleh pendakwaan melalui pemeriksaan balas dan dengan memutuskan bahawa keterangan tertuduh berhubung kewujudan Arlinda yang dikatakan di tempat kejadian dan beg berwarna kuning yang dibaling ke arahnya oleh Dayangku Arlinda tidak dicabar oleh pendakwaan semasa pemeriksaan balas; dengan memutuskan bahawa pendakwaan tidak mengemukakan hasil cap ibu jari meskipun ujian telah dilakukan; dengan tidak menjelaskan kenapa hasil ujian cap ibu jari adalah negatif; dan kerana gagal menilai semua keterangan yang sedia dikemukakan semasa perbicaraan.

Diputuskan, membenarkan rayuan:

(1) Pembelaan tidak menimbulkan keraguan munasabah dalam kes untuk pendakwaan dan majistret perbicaraan yang bijaksana telah terkhilaf dalam penemuan. Berdasarkan keterangan yang dikemukakan, pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 30).

(2) Majistret yang bijaksana berpendapat bahawa tiada cabaran terhadap keterangan tertuduh berhubung kewujudan Arlinda dan menurut majistret yang bijaksana, ini membentuk keraguan munasabah dalam kes pendakwaan. Mahkamah tidak bersetuju bahawa tiada terdapat cabaran terhadap keterangan tertuduh berhubung isu-isu penting tersebut. Pendakwaan sememangnya telah mencabar, dari segi terma, keterangan tertuduh berhubung kewujudan dan peranan Arlinda. Oleh demikian, majistret yang bijaksana telah salah arah diri beliau apabila membuat penemuan fakta bahawa tiada cabaran berhubung keterangan tertuduh tentang fakta-fakta material tersebut (lihat perenggan 15–16).

(3) Dalam kes ini, oleh kerana terdapat keterangan langsung berhubung milikan tertuduh ke atas beg kertas kuning dan pengenalannya adalah pasti, keterangan cap jari atau DNA dianggap kurang nilai atau maknanya. Tanpanya tidak mengurangkan isu milikan dalam kes ini. Oleh itu, apabila majistret yang bijaksana memutuskan bahawa kegagalan untuk mengemukakan hasil ujian cap jari telah menimbulkan keraguan munasabah dalam kes pendakwaan, beliau telah, salah arah diri beliau dan terkhilaf dari segi fakta dan undang-undang (lihat perenggan 24–25).

(4) Kes pendakwaan adalah kes milikan dadah berbahaya. Beberapa saksi pendakwaan telah memberi keterangan bahawa bukti yang menunjukkan sesuatu itu bersalah telah dijalankan oleh tertuduh. Testimoni-testimoni mereka adalah keterangan langsung berhubung elemen utama pertuduhan, iaitu, milikan dadah. Fakta bahawa tertuduh membawa bukti yang menunjukkan sesuatu itu bersalah mempunyai konotasi elemen milikan manakala fakta bahawa dia membuang bukti yang menunjukkan suatu itu bersalah setelah menyedari kehadiran polis

memberi inferens pengetahuan. Secara alternatif, andaian pengetahuan di bawah s 37(d) ADB adalah terpakai. Oleh itu, elemen-elemen milikan dadah di bawah s 12(2)/39A(1)(r) ADB telah dibuktikan oleh pendakwaan menurut kehendak piawai bukti. Tertuduh, dalam memasuki pembelaannya telah gagal menunjukkan apa-apa keraguan munasabah ke atas kes pendakwaan. Justeru, majistret yang bijaksana telah terkhilaf kerana tidak mendapati tertuduh bersalah kerana kesalahan yang dituduh (lihat perenggan 26).

(5) Berdasarkan keseluruhan keterangan, versi tertuduh berhubung kewujudan 'Arlinda' dan peranannya sebagai ejen perangkap tidak disokong oleh apa-apa keterangan langsung. Peguam yang bijaksana bagi pihak tertuduh telah mendedahkan nombor telefon bimbit yang dikatakan milik Arlinda semasa perbicaraan. Tambahan pula, ia adalah kes untuk tertuduh bahawa Arlinda adalah peniaga pil-pil 'Ginseng' dan bahawa dia selalu membeli pil-pil tersebut daripadanya dan menjual semula pil-pil tersebut pada harga yang lebih tinggi sedikit. Oleh kerana itu, tiada sebab untuk pembelaan tidak memanggil Arlinda memberi keterangan bagi menyokong kes pembelaan. Jika dia dipanggil untuk memberikan keterangan, kes pendakwaan mungkin menjadi rumit akibat kurang kebolehpercayaan. Adalah selamat untuk membuat kesimpulan bahawa versi tertuduh berhubung kewujudan dan peranan Arlinda adalah palsu. Ia kelihatan seperti satu percubaan untuk membentuk suatu yang diperlihat sebagai keraguan munasabah dalam kes pendakwaan (lihat perenggan 29).]

Cases referred to

Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489; [2004] 4 CLJ 551, CA (folld)

Pendakwa Raya v Abdul Aziz Adei (Bil 45–23 of 2002 (MTJ3), HC (refd)

PP v Ang Yue Suien [2012] MLJU 689, HC (refd)

PP v Fom It Cheong [1991] 3 CLJ (Rep) 524, HC (refd)

PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 1 CLJ (Rep) 285, SC (refd)

PP v Mansor bin Md Rashid & Anor [1996] 3 MLJ 560; [1997] 1 CLJ 233, FC (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 39A(1)(r)
Evidence Act 1950 s 114(g)

Dominic Chew Ban Huat (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
PJ Perira (PJ Perira & Co) for the respondent.

Supang Lian J:

PRELIMINARY

[1] Ms Norsapiana bt Yusof ('the accused/respondent') was charged for being in possession without lawful authorisation 28.88g of methamphetamine under s 12(2) of the Dangerous Drugs Act ('DDA') which is an offence punishable under s 39A(1)(r) of the same Act. At the trial before the learned magistrate, the prosecution/appellant called six witnesses. At the close of the case for the prosecution, the court below ruled that a prima facie case had been made out and ordered the accused to enter her defence on the charge preferred. The accused elected to give evidence on oath and she was the sole witness for the defence. The prosecution had offered several witnesses to the defence namely Salasiah Basri, Algebran Jumadil and Sgt Azizan. However, the defence was unable to call Salasiah Basri because she was deported to the Philippines in January 2011. The defence was also unable to call Algebran Jumadil as he could not be contacted and according to family members he is believed to be working in Singapore. As for Sgt Azizan, the finger print expert, he had passed away. At the close of the case for the defence, the learned trial magistrate discharged and acquitted the accused. The prosecution appeals to this court against the discharge and acquittal.

THE GROUNDS OF APPEAL

[2] By the petition of appeal, the prosecution has raised five issues namely:

(a) the learned magistrate had erred in law and fact in coming to the conclusion that the crucial facts put by the defence witness was not rebutted by the prosecution by way of cross-examination;

(b) the learned magistrate had erred in law and fact in coming to the conclusion that the evidence of the accused on the existence of Dayangku Arlinda who was allegedly at the place of incident and the yellow bag thrown at her by the said Dayangku Arlinda was not challenged by the prosecution during cross-examination;

(c) the learned magistrate had erred in law and fact in ruling that the prosecution did not tender the result of the fingerprint though the test was done;

(d) the learned magistrate had erred in law and fact in ruling that the prosecution had failed to explain why the result of the fingerprint test is negative; and

(e) the learned magistrate erred in fact and law in failing to evaluate all the evidence made available at the trial.

THE CASE FOR THE PROSECUTION

[3] On 16 February 2010, upon receiving information from an informer, ASP Yong Hock Lim ('PW1') together with a number of police personnel from the Narcotics Unit of IPPD Sandakan conducted a drugs raid at Restaurant Masam Manis, Bandar Maju, Batu 1 1/2, Sandakan. ASP Yong together with his men had earlier left the Narcotics Unit Office of IPPD Sandakan for Bandar Maju, Batu 1 1/2, Sandakan at about 7pm to conduct surveillance. Upon arrival at Bandar Maju, ASP Yong and his men had split into three teams. ASP Yong was the head of the first team, whilst Insp Lee Jiunn Wey and L/Cpl Phan Lee Chian ('PW2') led the second team. The skipper for the third team was Cpl Januri ('PW5'). The first team stationed itself above Tuaran Spoon Restaurant and hence they had a bird's eye view of the scene of location. The second team was the interception team and it was stationed in front of the 'bundle' shop. The third team on the other hand was to make observations and tasked with preventing the accused from escaping should the need arise. For that reason, it was stationed at the exit of Bandar Maju.

[4] At about 8.20pm, a Proton Exora with registration No SS1731N entered Bandar Maju. Algebran Jumadil, a relative of the accused, drove this vehicle. The passengers in the car were the accused and her friend Salasiah Basri. The car stopped in front of Restaurant Masam Manis whereupon the accused disembarked carrying with her a yellow paper bag.

[5] Upon seeing the accused, ASP Yong instructed Insp Lee to block the Proton Exora to prevent it from escaping and to arrest the accused as well as the other passengers in the car. Upon realising the presence of the police, the accused threw the yellow paper bag onto the ground. Thereupon, L/Cpl Phan arrested the accused. Insp Lee then picked up the yellow bag and handed it over to ASP Yong. The latter inspected the contents of the yellow paper bag. Inside he found a black plastic bag, which contained two transparent packets; one of medium size and the other smaller in size. The two transparent packets contained a white substance believed to be dangerous drugs. ASP Yong marked these items with a red marker pen, with the exception of the black plastic bag, which was marked with liquid ink. The accused, Algebran Jumadil and Salasiah Basri were then taken to the Narcotics Unit Office of IPPD Sandakan for further investigation. At the narcotics office, ASP Yong had gone on to weigh the substances suspected to be methamphetamine. It amounted to 53g. ASP Yong then lodged a police report in relation to the raid and the items seized. He further gave instructions for Insp Wan Mohd Khairil ('PW6') to carry out the investigations. The exhibits were handed over to Insp Khairil that night and he kept these items in a locked metal cabinet in his room. Insp Khairil marked with black marker pen each of the exhibits handed to him with the letter 'K'. He as well signed every one of the exhibits that he marked.

[6] In the course of investigation, the exhibits were sent to the chemistry department for analysis. The chemist found the white substances to be 28.88g of methamphetamine.

[7] On these facts established by the evidence, the learned magistrate ruled that the prosecution had made out a prima facie case and called on the accused to enter her defence.

THE DEFENCE

[8] As mentioned earlier, the accused ('DW1') was the sole witness for the defence. The learned magistrate in his grounds of decision elaborated on the defence made out which is as follows.

[9] On the day of the incident, the accused received a phone call from one Dayangku Arlinda ('Arlinda') requesting her to come to Sandakan to get 'ubat gensing' from her. She left Kunak for Sandakan arriving at about 5pm. She went to see her aunt before she met Arlinda. After receiving another call from Arlinda, she left her aunt's house and went to Bandar Maju, Mile 1½ reaching there at about 6.10pm. She and Arlinda then broke fast together and had a conversation until 7pm. She then asked Arlinda about the 'ubat gensing'. Arlinda asked her to get it from her car that was parked elsewhere. She then got into her Proton Exora car and proceeded to Arlinda's car. As she was approaching Arlinda's car suddenly a white car stopped her. She claimed that Arlinda had then thrown a bag to her, reversed her car and then fled the scene. Insp Lee and L/Cpl Phan had then gone on to arrest her. She claimed to have informed Insp Lee about the car, which left the car park, but Insp Lee ignored her. Insp Lee picked up the bag and handed it to ASP Yong. After that, they were taken to the Balai Polis Sandakan. They waited for Insp Khairil there and he turned up at about 11pm. Insp Khairil threatened the accused and said that he would get her brother-in-law involved. At about 12 midnight, they were sent to the lock-up.

[10] The accused said that she did not know about the content of the bag. According to her, ASP Yong did not inspect or examine the content of the yellow bag in front of her. Even after they were brought to the *balai polis*, the contents were not shown to them. She claimed that she had only seen them in court. She said that she did not know the weight of the items seized and neither had ASP Yong informed her even when she was imprisoned. She did not see ASP Yong writing the police report or weighing the items seized or handing over the seized items to Insp Khairil.

[11] She testified further that she knew Dayangku Arlinda from Salasiah Basir and that her relationship with her was to buy 'ubat gensing' from her. She

claimed that 'ubat gensing' was for beautification of the body and it comes in red tablets in green plastic bottles. Each bottle costs RM25 and the accused sells at RM30 per bottle. It was Arlinda that had supplied the 'ubat gensing'.

[12] The accused went on to say that no caution was given to her immediately after her arrest and her statement was taken two days after her arrest. A male officer whose name she did not know recorded the statement. However, Insp Khairil and another male Indian officer were present while her statement was recorded. There were no female officers present. She claimed that during the interrogation, the Indian officer assaulted her stepping on her hands and putting his shoes into her mouth.

THE ISSUES ON APPEAL

[13] The learned magistrate found that the evidence of the accused had raised a reasonable doubt in the case for the prosecution entitling the accused to a discharge and acquittal. This brings us to the issues raised in the appeal as they pertain to the grounds given by the learned magistrate for concluding that the accused had raised a reasonable doubt in the prosecution's case.

Whether the learned magistrate had erred in law and in fact in finding that the crucial facts put forth by the accused were not rebutted by the prosecution by way of cross-examination in particular the evidence of the accused about the existence and role of Dayangku Arlinda was not challenged in cross-examination

[14] In his grounds of judgment, the learned magistrate has ruled as follows on this issue (at p 331 of the appeal record (encl 3)):

> I agree with the learned defence counsel submission in this case that failure to cross examine the witness on important facts would affect the prosecution case. The principle is that failure to cross examine a witness on important facts would amount to an acceptance. In this case there were facts that put forward by the accused that were crucial for the Prosecution to rebut it by way of cross-examination. It is significant to note that the accused testimony was not challenged by the Prosecution in cross-examination about the existence of Dayangku Arlinda who was allegedly at the place of incident and the yellow bag thrown at her by Dayangku Arlinda. Further to that there was no challenge by the Prosecution on the identity or role played by Dayangku Arlinda as testified by the accused.
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> In the case of *Wong Yee Sen v PP* [1990] 1 MLJ 1872, his Lordship Faiza Thamby Chik JC held that:
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> > Cross-examination is the examination of a witness by the adverse party, that is, the party opposed to the one that calls him. What is the aim of cross-examination? Really there is one aim only. It is to assist in the administration of justice by revealing the truth to the Court. The function of

A cross- examination is to eliminate or reduce the danger that a false conclusion will be reached. Wigmore has declared that cross-examination is beyond doubt the greatest engine ever invented for the discovery of truth.

B **[15]** Quite clearly, the learned magistrate is of the view there was no challenge of the evidence of the accused of the presence of Dayangku Arlinda, her actions and the role she played as agent provocateur. This, according to the learned magistrate has created a reasonable doubt in the case for the prosecution.

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[16] The learned deputy public prosecutor submits that there was in fact a challenge of the evidence of the accused on the presence and role of Dayangku Arlinda as an agent provocateur. This, the learned deputy says, is evident from a perusal of the notes of proceedings as reproduced in the supplementary
D record of appeal (encl 4). With all due respect to the learned trial magistrate, I do not agree that there was no challenge of the evidence of the accused on these material issues. I have perused the notes of evidence/proceedings and read the excerpts of the cross-examination of the accused. I find that the prosecution had in fact challenged, in the strongest of terms, the evidence of the accused on
E the presence and role of Dayangku Arlinda. For the sake of clarity, I produce the relevant excerpts of the notes of evidence below:

NOP (pp 14–18 encl 4) cross-examination (of DW1)

F Q: Kamu takut masuk penjara tak?

A: Takut

Q: Saya katakan kepada kamu apa yang kamu cerita hari ini adalah satu rekaan satu pembohongan sebab kamu takut masuk penjara?

G A: Tidak, saya tidak pernah berkata tidak benar dalam mahkamah ini, apa yang saya kata tiada yang tidak benar

…

Q: Kamu kata kamu buka puasa pada malam itu dengan Dayangku Arlinda?

A: Ya

H Q: Kamu tipu kamu tidak berbuka dengan Dayangku Arlinda?

A: Saya berbuka puasa di restoran Tuaran Spoon

Q: Siapa makcik kamu yang kamu singgah?

I A: Pamalsia Omar

Q: Semasa kamu di siasat adakah kamu bagitahu nama Pamalsia Omar kepada polis?

A: Saya hanya beritahu dengan anggota polis makcik saya, sebab dia orang tidak Tanya nama

Q: Apa yang kamu kata kamu buka puasa dengan Dayangku adalah penipuan besar, kamu sebenarnya berbuka puasa dengan makcik kamu?

A: Memang saya singgah dengan makcik saya lepas itu dayang telefon saya untuk buka puasa dengan dia

Q: Kamu kekalkan kamu buka puasa dengan Dayangku Arlinda?

A: Ya

DPP:I wish to tender the witness statement

DC: I am objecting to it, because it can't be used against the OKT

CT: Objection sustained

Q: Bagaimana kamu berhubung dengan orang ini yang bernama dayangku Arlinda?

A: Melalui telefon, dia telefon saya

……

Q: Sebenarnya apa yang berlaku pada malam itu ialah kamu bawa beg kuning itu dan kamu buang beg kuning itu sebab kamu takut bawa barang terlarang?

A: Saya tidak ada bawa apa-apa beg dan Dayangku yang membaling beg kepada saya

Q: Semua apa yang kamu cerita adalah satu tipu untuk bebaskan kamu dari pertuduhan?

A: Saya tidak tipu, saya cakap benar.

[17] From the above, it can be seen that the prosecution had challenged the accused on her evidence of having broken fast with Dayangku Arlinda, alleging instead that it was with the accused's aunt (*makcik*). There is even a specific challenge of her evidence that the bag was thrown at her by this Dayangku Arlinda. This can be seen from the prosecution putting it to her that what actually occurred that evening was she herself had brought the yellow bag and then threw it away. What was more, the prosecution had categorically put it to her more than once that her evidence in court and the story she had put forth was all a concoction and a lie to get off the hook and to avoid going to prison. If this is not a challenge of her story in court (which includes her evidence regarding the existence and role played by Dayangku Arlinda) then what else could it be. It is therefore my considered opinion that the learned magistrate had misdirected himself when making the finding of fact that there was no challenge of the accused's evidence on these material facts. It follows that in as much as the learned magistrate has ruled that not challenging the evidence on these material issues amounted to acceptance of the evidence, thus, casting a reasonable doubt in the case for the prosecution, it is, in my judgment, an error of fact and law.

Whether the learned magistrate had erred in law and in fact in ruling that a reasonable doubt was raised in the case for the prosecution because it did not tender the result of the fingerprint test although done and it did not explain why the result of the fingerprint test is negative

[18] In regard to this, the learned magistrate states as follows in his grounds of judgment (at pp 332–333 of the AR (encl 3):

> Apart from that, having considered the defence of the accused also I think it did raise a reasonable doubt on my mind as to the guilt of the accused. She testified that the bag was thrown away by Dayang as she approaches her before being apprehended by Phan. She also said she did not know what was inside the bag and ASP Yong also did not show to her the content of the said bag at that time. Because of this evidence I think the fingerprint dusting is important to determine the possession that is to determine whether the accused or Dayang fingerprint was on the said bag. It is unfortunate for the prosecution in this case as they did not tender the result of the fingerprint though the test was done. It is important for the prosecution in this case also to explain why the result is negative and to tender the report as part of the evidence. This issue ofcourse raises a reasonable doubt on the prosecution case.
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> In the case of *Public Prosecutor v Fom It Cheong* [1991] 3 CLJ (Rep) 524, the High Court held that 'A doubt was raised as to why no finger print dusting was carried out on the drug exhibits. The benefit of the doubt must be given to the accused; in addition, F's T-shirt shorts and nail diggings did not contain any traces of heroin. Inspector Lokman further testified that no finger print dusting was done on the drug exhibits though this could easily have been done, and that finger-print dusting is normally done by the police. A doubt arises as to why this was not done. The benefit of that doubt must be given to the accused.
>
> In the case of *Public Prosecutor v Mok Kar Poh* [2001] 5 CLJ 206, his Lordship (SIC) Zainun Ali held that 'Next comes the question of the fingerprints of the accused. It is the defence's contention that the failure of the prosecution to dust the six packages for fingerprints and the failure to take hand swaps or nail clippings from the accused to show whether there are traces of drugs on his hands, would be to their detriment, since it does not show any link between the accused and the drugs. Possession is also not to be inferred in the absence of this nexus. Although the court concedes that the above methods in some situations are merely procedural, it would be a wise prosecution which would do all things necessary to bring home the charge. It is almost careless and capricious to say that since the accused was arrested on the spot and his identity is known, what good would taking fingerprints and nail clippings do? It is this court's view that it would be prudent for the prosecution not to be oblivious to the obvious methods required to close the gap.

Thus, the learned magistrate was of the view that the result of the fingerprint dusting is important to determine who possessed the incriminating evidence during the raid.

[19] The learned DPP submits that this stance is erroneous because the true

position in law is that there is no need for fingerprint evidence where the identity of the accused is not in dispute. In support of this contention, the learned deputy refers to *Public Prosecutor v Mansor bin Md Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233; *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551 and *Pendakwa Raya v Abdul Aziz Adei* (Bil 45–23 of 2002 (MTJ3), High Court at Wilayah Persekutuan, unreported. By virtue of these authorities, the learned deputy submits that the learned magistrate had erred when he held that fingerprint evidence was essential to the prosecution's case. Fingerprint evidence is not essential in the present case because the accused was caught red handed in possession of the incriminating evidence. Furthermore, the identity of the accused is not in dispute. Fingerprint evidence is only required where the prosecution relies on circumstantial evidence or where the identity of the accused in dispute.

[20] In reply, learned counsel for the accused says that the evidence of the fingerprint dusting and DNA profiling although negative, were solid scientific evidence, which can show physical nexus between the accused and the incriminating exhibits. Fingerprint and DNA profiling evidence thus represents the best evidence. Any omission or failure to produce such evidence is normally interpreted in favour of the accused and warrants the drawing of the adverse inference under s 114(g) of the Evidence Act 1950. Learned counsel relied on the cases of *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 1 CLJ (Rep) 285, *Public Prosecutor v Fom It Cheong* [1991] 3 CLJ (Rep) 524 and *Public Prosecutor v Ang Yue Suien* (K45–07 of 2010).

[21] With all due respect, this court and the court below stand guided by the decision in *Public Prosecutor v Mansor bin Md Rashid & Anor*. In that case, the learned trial judge discharged and acquitted the accused on the ground, inter alia, that no finger prints were lifted from the wrappings of the cannabis in question. Chong Siew Fai CJ (Sabah and Sarawak) delivering the judgment of the Federal Court observed at p 576 (MLJ); p 250 (CLJ):

> We also find ourselves in agreement with the learned deputy public prosecutor that the learned trial judge had erred in law when he faulted PW13 the investigating officer for not lifting the finger prints off the wrappings of the cannabis and for not taking photographs of the street light in front of the house No 129. Where the identity of a culprit is in question or required to be proved, fingerprint evidence would be of great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of sale and there is evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumes little value or significance.

[22] This principle was applied in yet another case of high authority, namely,

A the Court of Appeal decision in *Gunalan Ramachandran & Ors v Public Prosecutor*. In that case, Abdul Hamid JCA, as he then was, said at p 509 (MLJ); p 568 (CLJ):

> It was submitted that there was no nexus between the appellants and the drug. Even though the packets containing the drug were sent to PW7 for finger printing impression, no finger printing impression sufficient for analysis could be lifted. Hand swaps and nail clippings were not taken.
>
> In my view, such evidence, if any, would add to other available evidence of possession. Without it, it does not necessarily mean that possession is not proved. In view of what I have said earlier regarding proof of possession as found by the learned judge on the facts and in the circumstances of this case, the inability to lift sufficient finger print impressions from the packets for analysis and the failure to take hand swaps and finger nail clippings does not in any way affect that finding of possession by the learned judge. This ground too fails.

[23] In *Pendakwa Raya v Abdul Aziz Adei*, unreported, Heliliah Mohd Yusoff J, as she then was, deciding on the same point said at p 17:

> The details in a prosecution's case will vary depending on the circumstances of each case with regard to evidence of finger prints … The court is guided by the decision of the Court of Appeal in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489; [2004] 4 CLJ 551 for the purpose of addressing the issue of a nexus between the OKT and the drugs. The lack or absence of evidence of finger prints on exh P12 does not in my view detract from the issue of possession where in this case the OKT is seen by PW4 taking out a package from the bag exh P14 which OKT is also seen carrying into the room.

[24] Following from the principle enunciated in *Public Prosecutor v Mansor bin Md Rashid* , and the cases above, I find myself in agreement with the learned deputy that in the present case, as there was direct evidence of the accused's possession of the yellow paper bag and her identity was sure, the finger print or DNA evidence assumes very little value or significance. In my view, the lack of it does not detract from the issue of possession in this case.

[25] Thus, when the learned magistrate held in the present case that the failure to tender the result of the fingerprinting test has raised a reasonable doubt in the case for the prosecution, he had, in my opinion, misdirected himself and had erred in fact and in law.

Whether the learned magistrate erred in fact and law in failing to evaluate all the evidence made available at the trial

[26] The learned deputy argues that the learned magistrate had failed to consider the totality of the evidence adduced. The case for the prosecution is

one of possession of dangerous drugs. Numerous prosecution witnesses have testified that the incriminating evidence was carried by the accused. Their testimonies are direct evidence of the primary element of the charge, namely, possession of drugs. The fact that the accused carried the incriminating evidence connotes the element of possession whereas the fact that she threw the incriminating evidence upon realising the presence of the police infers knowledge. Alternatively, the presumption of knowledge under s 37(d) of the DDA 1952 applies. Thus, the elements of drugs possession under ss 12(2)/39A(1)(r) of the DDA 1952 have been established by the prosecution to the required standard of proof. The accused in entering her defence has failed to cast any reasonable doubt on the case for the prosecution. Her story of the presence at the scene and the role of Dayangku Arlinda was a fabrication. Hence, the learned magistrate erred in not finding the accused guilty of the offence charged.

[27] In this regard, the learned magistrate in his grounds of judgment said (at pp 333–334 of the AR encl 3):

> Of course I am not totally convinced of the accused's explanation but as Suffian J (as he then was) said in *Mat v PP* [1963] 1 MLJ 263; [1963] 1 LNS 82:
>
> > If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt … Acquit.
>
> Based on the above reasons I find that the defence had successfully raised a reasonable doubt on the prosecution case. The prosecution had failed to prove the case beyond reasonable doubt. The accused is hereby discharged and acquitted of the preferred charge.

[28] With all due respect, I find myself in agreement with the learned deputy that the story of the accused had not cast a reasonable doubt in the case for the prosecution. In the first place, in holding that the accused had raised reasonable doubt in the prosecution's case, the learned magistrate had acted on two erroneous findings of fact and law. As explained earlier, the first is the erroneous finding of fact and law that the prosecution had accepted the evidence of the accused by not challenging the evidence on the existence and role of Dayangku Arlinda during cross-examination. The second is the error in fact and in law in concluding that the failure of the prosecution to adduce evidence of the result of the fingerprint test has cast a reasonable doubt in the case for the prosecution on the element of possession. In my view, the learned magistrate was thus misguided into holding that the accused had cast a reasonable doubt in the case for the prosecution. If he was not so misguided he would have found, in my view, that there was no such reasonable doubt raised at all in the case for the prosecution.

[29] Additionally, I would say that on the totality of the evidence, the story

of the accused about the presence of 'Dayangku Arlinda' and her role as agent provocateur was unsupported by any evidence whatsoever. Learned counsel for the accused had disclosed the purported mobile phone number of Dayangku Arlinda during trial. Moreover, it was the case for the accused that Dayangku Arlinda was a dealer in 'ginseng' tablets and that she used to buy the tablets from her and resold them at a slightly higher price. That being the case, there was no reason for the defence not to have called this Dayangku Arlinda to give evidence in support of the case for the defence. If she were called to give evidence, the prosecution's case would have been reduced to shambles for lacking credibility. I therefore agree with the prosecution that it is safe to conclude that the story of the accused on the presence and role of Dayangku Arlinda was a fabrication. I would add that it appears to be an attempt to create the semblance of reasonable doubt in the case for the prosecution.

CONCLUSION

[30] For the reasons given above, I am of the view that on the totality of the evidence adduced, the defence had not raised a reasonable doubt in the case for the prosecution and the learned trial magistrate had erred in so finding. I find instead on the evidence adduced that the prosecution had proved its case beyond reasonable doubt. The accused is found guilty and convicted of the offence preferred under s 12(2) of the DDA 1952 and punishable under s 39A(1)(r) of the same Act.

ORDER OF THE COURT

[31] Accordingly, the appeal is allowed and the order of the learned magistrate discharging and acquitting the accused set aside.

Appeal allowed.

Reported by Afiq Mohamad Noor